SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

Michael Ippoliti, Esquire
Michael Ippoliti, P.A.
1225 King Street
P.O. Box 2284, Suite 900
Wilmington, Delaware ,19899

Walt F. Schmittinger, Esquire
Schmittinger & Rodroguez, P.A.
414 South State Street
P.O. Box 497
Dover, Delaware ,19903

RE: ***Joan West v. Wal-Mart, Inc.,***
C.A. No. 05A-03-022 RFS

Date Submitted: December 30, 2005
Date Decided: March 31, 2006

Dear Counsel:

This is my decision regarding Joan West's appeal of the Industrial Accident Board's decision dated March 1, 2005, denying Ms. West's Petition to Determine Additional Compensation Due. For the reasons set forth herein, the Board's decision is reversed and remanded for further factual findings and a determination not inconsistent with this opinion.

STATEMENT OF THE CASE

Joan West ("Claimant") was injured in a compensable work accident in March 2001, while working for Wal-Mart Inc. ("Walmart"). She suffered a hemiated disc and received workers compensation benefits. On September 28, 2004, Claimant filed a Petition to Determine Additional Compensation Due against Walmart, asking for partial disability benefits and unpaid medical expenses relating back to her injury.

Claimant underwent lumbar fusion surgery on February 4, 2002. Eight months later, in October of 2002, a bone scan indicated that the fusion may have failed. The recommendation to the Claimant was to undergo a further surgery in 2003. However, Claimant failed to do so. At some point around February of 2003, Claimant had a stroke.[1] In April of 2003, she had an appointment with Doctor Edward Quinn, her treating physician. He noted that at this time, Claimant had recovered from her stroke for the most part, was ambulatory with the help of a cane and neurologically intact.[2] The x-rays from that appointment showed that the fusion appeared to have solidified. At this point, Dr. Quinn released her to light duty work with back precautions. The precautions included no prolonged standing, walking, sitting, stooping or bending and no running, jumping or twisting. Dr. Quinn did not put any restriction on the number of hours Claimant could work when he released her to work in April of 2003. However, Claimant did not return to work in April 2003 or the subsequent months.

Claimant did not actually return to work until March 2004. In the eleven months between her release and her return to work, Claimant continued to receive worker's compensation benefits from Employer. When these benefits were terminated by Employer, Claimant then returned to work. At this point, Claimant's treating physician limited the number of hours that Claimant could work for the first two months of her return based on, in his words, "her deconditioned status only."[3]

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[1] There is apparently some discrepancy as to when the stroke occurred. Claimant states that the stroke occurred on February 14, 2003. (Tr. 34-36) The medical records introduced in the case pertaining to the stroke are from Dr. Quinn's transcribed notes, from an April 2003 appointment, which state that the stroke occurred on October 14, 2003. Both sides acknowledge that this must be an error. Notwithstanding the discrepancy, all sides seem to agree that Claimant had "recovered from the stroke, for the most part" by the time of the April 2003 appointment, as is stated by Claimant's attorney, referencing his conversation with Claimant's treating physician. (Tr. 16, quoting Dr. Quinn Deposition p.15).

[2] Deposition of Dr. Quinn p.15

[3] *Id*. at 31

Claimant had an open ended benefits agreement with Walmart relating to this compensable work accident which was finally terminated by Walmart effective March 8, 2004.

In March 2004, Claimant returned to Dr. Quinn and was reexamined. The objective physical examination was essentially the same as it had been eleven months beforehand. However, the major change was subjective. In March 2004, Claimant reported considerable improvement in her condition from eleven months before, and told Dr. Quinn that she was ready to go back to work. At this point Dr. Quinn released her to return to work on a progressive basis, to consist of four hours for the first month, six hours for the second month, and full time after eight weeks. His concern was that Claimant was deconditioned from having been out of work for so long, and that going from zero to eight hours would be difficult for her.[4]

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960), and to review questions of law de novo, *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v.*

[4] During Dr. Quinn's deposition the following exchange took place:

Q: [Save] for her deconditioned state, there was no medical reason as a result of her work injury or the sequelae associated with the surgery that she couldn't work on a full-time basis?

A: It was her deconditioned status only.

Chrysler Corp., 517 A .2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986). Substantial evidence is "more than a scintilla, but less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. Supr. 1981). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

DISCUSSION

A. Partial Disability

The major issues contested in this case are when Claimant was cleared by her Doctor to return to work and what restrictions were placed on her when she was cleared. However, Employer failed to file a brief to this Court to address the arguments raised in Claimant's appeal.

Employer asserted at the hearing that the crux of Claimant's argument is essentially that she should be allowed to disregard her treating physician's release to return to work. Then, notwithstanding that this decision to disregard by Claimant was the sole and direct cause of her decreased hours upon her return to work in March 2004, Employer should be responsible for the lost wages during her reconditioning.

Employer argues that Claimant only returned to work because her benefits were terminated. By waiting eleven months to return, after being cleared for work by her treating physician, Claimant's own choice not to return to work in April of 2003, was the cause of her deconditioned status in March of 2004. Therefore, by virtue of this intervening cause, Claimant should not be allowed to assert a claim for compensation for the two months in which she was allegedly working part time on her doctor's orders.

Claimant argues that she was not cleared to work in any capacity until March of 2004, and at that time she was given restricted hours. She argues further that she was unable to return to work in April of 2003 and that her deconditioned status was a result of her work injury in combination with her other infirmities including her stroke. Therefore, she was following her treating physician's orders when she returned to work on a part time basis, and is due compensation. Doctors Quinn and Volatile found a progressive return to work was reasonable, given Claimant's state of health at that time, noting that a progressive return to full time work would prevent relapses.

Claimant argued to the Board that *Gillard-Belfast v. Wendy's Inc.*, 754 A.2d 251 (Del. 2000), is controlling here. In that case, "the Board [had] no choice but to award the Claimant Partial Disability Benefits for the requested period from September 4th to February 17th because she has the right under the Supreme Court's opinion to rely on her treating physician's restrictions or instructions to work only twenty hours a week."[5] Claimant further argued to the Board that the *Gillard-Belfast* decision was correctly applied by the Board in the case of *Mackert v. Grotto's Pizza*, IAB Hearing No. 1231323 (May 27, 2004). On appeal, Claimant again presents these cases as evidence that the Board erred in failing "to award partial disability benefits to [her] where her work-related injury and corresponding work restrictions have resulted in a decrease in earning capacity."[6]

In *Gillard-Belfast*, the claimant sustained an industrial injury to her knee while working for Wendy's for which a second surgical procedure was necessary. Claimant's treating physician ordered her not to work at all until completion of her second surgical procedure. Although this order was apparently given under the belief that the surgery

[5] *Id*. at 90
[6] Appellant's Brief at 9.

could be completed a few weeks later, due to insurance authorization issues, claimant was out of work for eight months.

Claimant then sued for total disability benefits from Wendy's for the eight months she was unable to work. Upon examination by employer's physician however, it was determined that Gillard-Belfast was not totally disabled during this period, and claimant would have been capable of working. The Board then found that because claimant was capable of some work, she was not entitled to temporary total disability for the period between the surgeries. This decision was overturned by the Supreme Court.

Our Supreme Court ruled that, if correct, the Board's decision would "place injured workers in a completely untenable position. If a treating physician's order not to work is followed, the claimant risks the loss of disability compensation if the Board subsequently determines that the claimant could have performed some work. Conversely, if the treating physician's order not to work is disregarded, a claimant who returns to work not only incurs the risk of further physical injury but also faces the prospect of being denied compensation for that enhanced injury."[7]

In *Mackert*, a *Gillard-Belfast* issue was raised before the Board. In that case, the question was a contradiction in the medical testimony, with employer's physician telling claimant she was capable of returning to work and claimant's treating physician instructing her to only work twenty hours a week. After hearing all the evidence, the Board agreed with the employer's physician that Mackert had been capable of returning to work full time. Notwithstanding that finding, the Board ruled that, under *Gillard-Belfast*, claimant was entitled to rely on her treating physician's instructions only to work twenty hours per week.

[7] *Gillard-Belfast v. Wendy's Inc.*, 754 A.2d 251, 253 (Del. 2000)

In the present case, this Court notes that the Board did not address either of the above cases, both of which were presented to it during the hearing. As these cases may be critical to evaluate the legal merits of the appeal, the Board must address them. The Board did note that "Claimant, by her failure to obey her surgeon's work orders, effectively caused herself to become deconditioned and neither the Board nor any medical expert could relate this physical deterioration to Claimant's March 2001 work accident."[8] This reference was to the April 2003 office visit with Dr. Quinn. At that time, Claimant was not required to return to work and was receiving total disability by agreement. Further, the record is not clear whether Dr. Quinn "ordered" Claimant to return. The Board did not review the *Gillard-Belfast* and *Mackert* legal principles, nor did the Board discuss evidence which may bear on the point. These are issues that may affect the March 2004 return to work order with limited hours.

In this regard, the Board neglected to evaluate the other medical testimony in the case when issuing its decision. The Employer had Dr. Case evaluate the Claimant. He described the Claimant as "totally disabled" on January 15, 2003, with a poor prognosis.[9] In a report after an examination on June 28, 2004, her condition was "severely disabled."[10] Dr. Case had the benefit of the medical records from Dr. Quinn recording his findings in April of 2003, and after the return to work note was given in March of 2004. The Board is tasked to evaluate medical expert testimony, and it must provide specific, relevant reasons for doing so should some opinions be more persuasive than others. (*SeeTurbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214 (Del. 1998), and *Lemmon v. Northwood Constr.*, 690 A.2d. 912 (Del. 1996).)

[8] *West v. Walmart*, IAB Hearing No. 1201426 (March 11, 2005)
[9] Deposition of Dr. Case at 34
[10] *Id.* at 37

Considering the foregoing, this issue is remanded back to the Industrial Accident Board for a rehearing in order for the Board to make further factual determinations with consideration of the *Gillard-Belfast* and *Mackert* cases with the associated principles of law.

B. Medical Expenses

Claimant claims that the Board erred as a matter of law in failing to pay for certain medical expenses that Claimant assert are the result of her March 2001 work accident. Claimant correctly states the law regarding payment of medical expenses and asserts that she has proven that she has (a) incurred medical expenses; (b) that the expenses are attributable to a work related injury; and (c) the employer has not paid the expenses.[11]

Claimant asserts that her presentation of medical bills satisfies her burden, relying on *Thomas Roofing Company v. Wendell Whaley*, 1983 Del. Super. LEXIS 673, and *General Motors Corp. v. English*, 1991 Del. Super. LEXIS 180, as authority. However, the main issues in both of these cases involve Board determinations of whether the amounts charged by medical professionals were reasonable in light of the services rendered. In these cases, presentation of a doctor's bill has been held to be *prima facie* evidence that the expense was reasonable. Therefore, it follows that after the presentation of a bill for medical service, the burden shifts to the other side to produce evidence in order to contest the reasonableness of the bill's amount.

However, it does not follow that presentation of medical bills, by themselves, satisfy the Claimant's burden to prove (a) he has incurred medical expenses, (b) such expenses are attributable to a work-related injury and (c) the employer has not paid such expenses as required by 19 *Del.C.* § 2322. A connection between the condition treated by

[11] *Johnson Transp. Co. v. Dunkle*, 541 A.2d 551 (Del. 1988).

the physician and the Claimant's compensable accident, as per (b) above must be established.

The Board noted that "Claimant presented a stack of invoices and bills, which she alleges support her medical expense claim of over $1200.00. The only testimony supporting these expenses came from Dr. Quinn wherein he noted that Claimant's medical treatment was reasonable, necessary and related to her work accident. In short, multiple invoices were submitted but the Board is unable to discern what treatment was provided for what disorder by what provider and for what reason. It is clear that none of the experts were inclined to explain and support the medical expenses. The Board is certainly not tasked nor inclined to page through the invoices and figure this out. Accordingly, the Board finds that Claimant has failed to meet her burden demonstrating that her medical expenses are reasonable, necessary and related to her 2001 work accident."[12]

These determinations are findings of fact to be made by the Board upon the evidence presented to them. If the Board rejects the medical expenses, it must explain it reasoning for the rejection. Simply refusing to page through the invoices is not a valid finding of fact. Although a tedious task, it is clear that Claimant obviously incurred medical expenses in relation to her work accident. The means of presentation of the medical bills should not, in itself, disqualify her from collection for her expenses.

The Board's statement paints too broad a brush and is not supported by substantial evidence. The record is clear that some of the medical expenses are related to the treatment of the March 2001 work accident. Dr. Quinn found that the treatment provided by Delaware Bone and Joint Specialists, formerly the Dickenson Medical Group was reasonable and necessary. His colleague, Dr. Volatile, treated Claimant twice on October

[12] *West v. Walmart*, IAB Hearing No. 1201426 (March 11, 2005)

8, and 29, 2002. The Claimant was "absolutely miserable."[13] Because of concern that the fusion did not take, further studies were ordered at the October 8 visit. They were done at Milford Memorial Hospital ("MMH"). A fair reading of Dr. Volatile's testimony supports Dr. Quinn's assessment of Claimant's treatment needs. The doctor retained by the Employer agreed that Dr. Quinn's follow up visit in March of 2004 was reasonable for the Claimant's work related injury, and Dr. Case also discussed the visits and studies ordered by Dr. Volatile.[14]

The Claimant submitted bills, invoices, checks and receipts to Employer's counsel before and at the hearing. While Claimant does have other medical issues, such as suffering from two strokes in 1999 and 2003, diabetes and injuries from falls, the present record shows certain expenses should be recovered for the treatment by Delaware Bone and Joint Specialists. The Claimant presented checks to it in the time frame of the treatment of the work injury. Three checks dated August 19, 2002 (with receipt), in the amount of $25.00, September 17, 2002 (with receipt) in the amount of $25.00 and August 9, 2002 in the amount of $21.00 appear to be recoverable. When Dr. Volatile ordered tests at the October visit, the tests were performed on October 16, 2002 at MMH. They included a myelogram and CT scan. The MMH bill for its October, 16, 2002 service with Claimant's payment of $267.38 by check of December 2, 2002 toward this cost should be recoverable. In other words, there is no evidence to the contrary and no substantial evidence upon which these expenses can be summarily rejected.

The Court recognizes that the Claimant had other ailments and that the presentation of the bills could have been handled in a clearer way to the Board. However, there is a responsibility to deal with them. This is a Board function. Because certain of the

[13] Deposition of Dr. Volatile, p.11
[14] *Id*. at 16, 40.

expenses are clearly shown and the Board failed to discuss any of them, the subject will have to be addressed again.

CONCLUSION

Considering the foregoing, the decision of the Board is reversed and remanded for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary